

FEDERAL MAGISTRATES COURT OF AUSTRALIA

LEE v MINISTER FOR IMMIGRATION & ANOR

[2012] FMCA 1046

MIGRATION – Review of decision of MRT – spouse visa – where applicant does not appear – where respondent argues that there is a separate and unimpeachable ground for coming to the decision.

Federal Magistrates Court Rules 2001, Pt 13 r.13.03C(1)(c)

Migration Regulations 1994

Migration Act 1958 (Cth), s.359A

VBAP of 2002 v Minister for Immigration & Anor [2005] FCA 965

SZDXC v Minister for Immigration & Anor [2005] FCA 1306

MZWPK v Minister for Immigration & Anor [2005] FCA 1256

Applicant:	PATRICK LEE
First Respondent:	MINISTER FOR IMMIGRATION AND CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 1117 of 2012
Judgment of:	Raphael FM
Hearing date:	6 November 2012
Date of Last Submission:	6 November 2012
Delivered at:	Sydney
Delivered on:	6 November 2012

REPRESENTATION

For the Applicant: No appearance

Counsel for the First
Respondent: Mr M Smith

Solicitors for the First
Respondent: Sparke Helmore

ORDERS

- (1) Application dismissed pursuant to Part 13 Rule 13.03C(1)(c) of the *Federal Magistrates Court Rules 2001*.
- (2) Applicant to pay the First Respondent's costs assessed in the sum of \$6,000.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY**

SYG 1117 of 2012

PATRICK LEE
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application by an unlawful non-citizen currently in detention at Villawood for review of a decision of the Migration Review Tribunal made on 20 April 2012 and handed down on 23 April 2012 affirming a decision not to grant the applicant a Partner (Temporary) class UK (visa). Mr Lee, the visa applicant, has appeared in this court on a number of occasions when the matter was listed for directions, but he is not here today.
2. There has been handed up to me by way of a tender an email from a Mr Swift who is the client service officer/transport and escort at Villawood to Ms Johnson, who is a solicitor with Sparke Helmore who is representing the Minister. The email reads:

“Subject: Patrick Lee

Nicola,

As per our phone conversation, Mr Patrick Lee has advised our escort staff that he would not be attending his hearing this morning due to the fact that he will be seeking a “ministerial intervention”.

Please call if you wish to discuss.”

3. Mr Lee was not present in court at 10.15a.m. and I am prepared to accept that he has no intention of so appearing.
4. I propose to dismiss the matter of non-attendance pursuant to Part 13 Rule 13.03C(1)(c) of the *Federal Magistrates Court Rules 2001*¹ but before I do so I think I should say something about the case itself in case Mr Lee is tempted to try and revive the action. What I am about to say comes largely from the excellent written submissions provided to me by Ms Johnson and Mr Smith who appears on behalf of the Minister.
5. The visa that Mr Lee sought is a visa that can be granted if primary criteria can be satisfied at the time of application and other primary criteria can be satisfied at the time of the decision. The relevant criteria is set out in clause 820.211 and 820.221 of the *Migration Regulations 1994*². One of the most important requirements of the criteria is that the applicant is a spouse of an Australian citizen or permanent resident or an eligible New Zealand citizen and has made the application for the visa within 28 days of the expiry of the last held substantive visa.
6. These criteria can be waived by the application of criteria 3001 and 3004 of the Regulations. The Minister before waiving the requirement must be satisfied that the visa applicant is not the holder of a substantive visa because of factors beyond his or her control (criterion 3004(c)) and that there are compelling reasons for granting the visa (criterion 3004(d)). The visa applicant must also satisfy the Minister that he has complied substantially with the conditions applicable to the last of any entry permits and subsequent bridging visa or the last of any substantive visa and bridging visa held by him (criterion 3004(e)).
7. There are other criteria which the Minister must look at in deciding whether or not to grant this type of visa, one of which, not

¹“Rules”

²“Regulations”

unreasonably, is that the Minister is satisfied that the parties were in a genuine de facto relationship which required a mutual commitment to a shared life to the exclusion of all others and a genuine and continuing relationship that finds the parties living together or not living separately and apart on a permanent basis and they not being related by family. When this matter came before the Tribunal it made a finding that at the relevant time the parties were not in a genuine de facto relationship the one with the other, they were later married but this was not a matter to be taken into account at that time as the marriage occurred after the date of visa application.

8. The Minister has accepted for the purposes of these proceedings that it could be argued that in coming to the conclusion that it did in relation to this criteria, the Tribunal failed to comply in the fullest possible terms with s.359A of the *Migration Act 1958* (Cth). The Minister argues that this is of no importance because there was a separate and independent and unimpeachable basis for coming to a decision that Mr Lee did not comply with the relevant criteria. The existence of a separate and unimpeachable ground negating the effect of a breach of the code for procedural fairness has been accepted by the Federal Court *VBAP of 2002 v Minister for Immigration & Anor* [2005] FCA 965 at [12], [17] and [33], *SZDXC v Minister for Immigration & Anor* [2005] FCA 1306 at [17] and *MZWPK v Minister for Immigration & Anor* [2005] FCA 1256 at [13].
9. The separate and unimpeachable ground was the failure of Mr Lee to make his application within 28 days or to satisfy the Minister that the criteria could be waived. The Tribunal concluded in this regard:

“The Tribunal is also not satisfied that the applicant became a person without a substantive visa because of factors beyond his control. He informed the Tribunal that he became an unlawful non-citizen because he had no money to lodge the application. He also informed the Tribunal that the sponsor took a loan to pay the application related fees. When asked why she could not have taken the loan several months earlier before his visa expired, to avoid his becoming an unlawful non-citizen, the applicant stated that he did not want to rely on his partner and become a burden for her and that he preferred to work and find the money through employment. The Tribunal does not accept that the applicant’s unwillingness to rely on his partner and his preference for self-reliance – particularly in circumstances when his partner did ultimately take the loan and when he had no permission to work to find money for the application – was a factor beyond the applicant’s control. The sponsor had the

opportunity to take out a loan. It was the applicant's decision whether to rely on his partner's loan or to find money through employment and he chose not to rely on his partner. The application was delayed and the applicant became an unlawful non-citizen because of that decision. The Tribunal is not satisfied that making such a decision which led to the applicant's substantive visa ceasing was a factor beyond the applicant's control. The Tribunal is not satisfied that the applicant meets Item 3003(c) and PIC 3003." [38] [CB 139-140]

10. The Tribunal then went on to consider whether there were compelling reasons for not applying the schedule 3 criteria:

"The applicant claims, with the respect of the existence of such reasons, that he is in a committed relationship with the sponsor and is committed to the child. Putting aside the Tribunal's concerns about the existence of such commitment, as set out below, the Tribunal does not consider that the mere existence of a genuine and committed relationship even in one involving a child is in itself sufficient to establish compelling reasons for not applying the Schedule 3 criteria." [39] [CB 140]

11. It seems to me that a decision as to whether or not to exercise its discretion not to apply the Schedule 3 criteria is a matter for the Tribunal alone, provided that the discretion is exercised lawfully. Nothing has been put to me to suggest that the reason given by the Tribunal that the mere existence of a genuine and committed relationship is not in itself sufficient to establish compelling reasons is an unlawful approach to take, and I do not see that it would be, because if it was, there would hardly be any need for the type of consideration that the Tribunal is being asked to make. Every applicant would say, *"I am in a committed relationship, and therefore it doesn't matter how long it took for me to make the application, notwithstanding the time limit imposed by the regulations."*
12. In these circumstances, even had Mr Lee attended today, I would have found it very difficult to find in his favour. He has been given an opportunity to file submissions going to matters such as the one I have referred to above but has not taken it. I doubt very much whether he would have arrived in court complete with a trolley load of relevant authorities denying the arguments put by the Minister.
13. In all these circumstances, I propose to dismiss the matter pursuant to Part 13 Rule 13.03C(1)(c) of the Rules and order that the applicant pay the first respondent's costs which I assess in the sum of \$6,000.00.

14.

I certify that the preceding twelve (12) paragraphs are a true copy of the reasons for judgment of Raphael FM

Date: 13 November 2012